

The parties have consented, under 28 U.S.C. § 636(c), to the jurisdiction of the undersigned Magistrate Judge. Plaintiff seeks review of the Commissioner's denial of disability benefits. As discussed below, the court finds that the Commissioner's decision should be reversed and this matter remanded for further proceedings.

Plaintiff David Montoya was born on March 10, 1956, and was fifty-one years old at the time of his latest administrative hearing. [Administrative Record ("AR") 24, 51.] He has a high school education and past relevant work experience as a courier and dye casting machine

1 operator. [AR 22.] Plaintiff alleges disability on the basis of
2 problems in his neck, middle back, lower spine and left hip, right eye
3 vision loss, and left ear hearing loss. [AR 154.]

4 **II. PROCEEDINGS IN THIS COURT**

5 Plaintiff's complaint was lodged on May 28, 2008, and filed on
6 June 2, 2008. On December 4, 2008, defendant filed an answer and
7 plaintiff's Administrative Record ("AR"). On February 10, 2009, the
8 parties filed their Joint Stipulation ("JS") identifying matters not
9 in dispute, issues in dispute, the positions of the parties, and the
10 relief sought by each party. This matter has been taken under
11 submission without oral argument.

12 **III. PRIOR ADMINISTRATIVE PROCEEDINGS**

13 Plaintiff applied for a period of disability and disability
14 insurance benefits ("DIB") on September 30, 2005, alleging disability
15 since January 1, 2001. [AR 17, 137.] After the application was denied
16 initially and on reconsideration, Plaintiff requested an
17 administrative hearing, which was held on October 11, 2006, before
18 Administrative Law Judge ("ALJ") Stuart M. Kaye. [AR 51.] Plaintiff
19 appeared without counsel, and testimony was taken from plaintiff and
20 vocational expert Sandra Trost. [AR 52.] A supplemental hearing was
21 held on April 11, 2007, before ALJ Kaye. [AR 24.] Plaintiff appeared
22 with counsel, and testimony was taken from Plaintiff, medical expert
23 Arthur Lorber, and vocational expert Heidi Paul. [AR 25.] The ALJ
24 denied benefits in a decision filed on September 24, 2007. [AR 17-23.]
25 When the Appeals Council denied review on April 8, 2008, the ALJ's
26 decision became the Commissioner's final decision. [AR 2-4.]

IV. STANDARD OF REVIEW

Under 42 U.S.C. § 405(g), a district court may review the Commissioner's decision to deny benefits. The Commissioner's (or ALJ's) findings and decision should be upheld if they are free of legal error and supported by substantial evidence. However, if the court determines that a finding is based on legal error or is not supported by substantial evidence in the record, the court may reject the finding and set aside the decision to deny benefits. See Aukland v. Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001); Tonapetyan v. Halter, 242 F.3d 1144, 1147 (9th Cir. 2001); Osenbrock v. Apfel, 240 F.3d 1157, 1162 (9th Cir. 2001); Tackett v. Apfel, 180 F.3d 1094, 1097 (9th Cir. 1999); Reddick v. Chater, 157 F.3d 715, 720 (9th Cir. 1998); Smolen v. Chater, 80 F.3d 1273, 1279 (9th Cir. 1996); Moncada v. Chater, 60 F.3d 521, 523 (9th Cir. 1995)(per curiam).

"Substantial evidence is more than a scintilla, but less than a preponderance." Reddick, 157 F.3d at 720. It is "relevant evidence which a reasonable person might accept as adequate to support a conclusion." Id. To determine whether substantial evidence supports a finding, a court must review the administrative record as a whole, "weighing both the evidence that supports and the evidence that detracts from the Commissioner's conclusion." Id. "If the evidence can reasonably support either affirming or reversing," the reviewing court "may not substitute its judgment" for that of the Commissioner. Reddick, 157 F.3d at 720-721; see also Osenbrock, 240 F.3d at 1162.

V. DISCUSSION

A. THE FIVE-STEP EVALUATION

To be eligible for disability benefits a claimant must demonstrate a medically determinable impairment which prevents the

1 claimant from engaging in substantial gainful activity and which is
2 expected to result in death or to last for a continuous period of at
3 least twelve months. Tackett, 180 F.3d at 1098; Reddick, 157 F.3d at
4 721; 42 U.S.C. § 423(d)(1)(A).

5 Disability claims are evaluated using a five-step test:

6 Step one: Is the claimant engaging in substantial
7 gainful activity? If so, the claimant is found not
8 disabled. If not, proceed to step two.

9 Step two: Does the claimant have a "severe" impairment?
10 If so, proceed to step three. If not, then a finding of not
11 disabled is appropriate.

12 Step three: Does the claimant's impairment or
13 combination of impairments meet or equal an impairment
14 listed in 20 C.F.R., Part 404, Subpart P, Appendix 1? If
15 so, the claimant is automatically determined disabled. If
16 not, proceed to step four.

17 Step four: Is the claimant capable of performing his
18 past work? If so, the claimant is not disabled. If not,
19 proceed to step five.

20 Step five: Does the claimant have the residual
21 functional capacity to perform any other work? If so, the
22 claimant is not disabled. If not, the claimant is disabled.

23 Lester v. Chater, 81 F.3d 821, 828 n.5 (9th Cir. 1995, as amended
24 April 9, 1996); see also Bowen v. Yuckert, 482 U.S. 137, 140-142, 107
25 S. Ct. 2287, 96 L. Ed. 2d 119 (1987); Tackett, 180 F.3d at 1098-99; 20
26 C.F.R. § 404.1520, § 416.920. If a claimant is found "disabled" or
27 "not disabled" at any step, there is no need to complete further
28 steps. Tackett, 180 F.3d 1098; 20 C.F.R. § 404.1520.

Claimants have the burden of proof at steps one through four,
subject to the presumption that Social Security hearings are non-
adversarial, and to the Commissioner's affirmative duty to assist
claimants in fully developing the record even if they are represented
by counsel. Tackett, 180 F.3d at 1098 and n.3; Smolen, 80 F.3d at
1288. If this burden is met, a prima facie case of disability is
made, and the burden shifts to the Commissioner (at step five) to

1 prove that, considering residual functional capacity ("RFC")¹, age,
 2 education, and work experience, a claimant can perform other work
 3 which is available in significant numbers. Tackett, 180 F.3d at 1098,
 4 1100; Reddick, 157 F.3d at 721; 20 C.F.R. § 404.1520, § 416.920.

5 **B. THE ALJ'S EVALUATION IN PLAINTIFF'S CASE**

6 Here, the ALJ noted that Plaintiff was last insured for DIB
 7 eligibility purposes on December 31, 2004, and that the relevant
 8 period for the disability determination was from January 1, 2001, to
 9 December 31, 2004. [AR 17.] As for the sequential evaluation, the ALJ
 10 found that plaintiff had not engaged in substantial gainful activity
 11 since his alleged disability onset date (step one); that plaintiff had
 12 "severe" impairments, namely a herniated disc and anterior spurs (step
 13 two); and that plaintiff did not have an impairment or combination of
 14 impairments that met or equaled a "listing" (step three). [AR 19.]
 15 The ALJ determined that Plaintiff had a residual functional capacity
 16 to lift and carry twenty pounds occasionally and ten pounds
 17 frequently; sit, stand and walk for six hours out of an eight hour
 18 day; occasionally bend, stoop and crouch but refrain from kneeling or
 19 crawling; avoid exposure to vibration; avoid overhead reaching; and
 20 avoid climbing ladders, ropes, scaffolds, unprotected heights, and
 21 slippery or wet surfaces. [AR 20.] Based on this RFC, Plaintiff could
 22 not return to his past relevant work (step four). [AR 22.] Taking

23
 24 ¹ Residual functional capacity measures what a claimant can
 25 still do despite existing "exertional" (strength-related) and
 26 "nonexertional" limitations. Cooper v. Sullivan, 880 F.2d 1152, 1155
 27 n.s. 5-6 (9th Cir. 1989). Nonexertional limitations limit ability to
 28 work without directly limiting strength, and include mental, sensory,
 postural, manipulative, and environmental limitations. Penny v.
Sullivan, 2 F.3d 953, 958 (9th Cir. 1993); Cooper, 880 F.2d at 1155
 n.7; 20 C.F.R. § 404.1569a(c). Pain may be either an exertional or a
 nonexertional limitation. Penny, 2 F.3d at 959; Perminter v. Heckler,
 765 F.2d 870, 872 (9th Cir. 1985); 20 C.F.R. § 404.1569a(c).

1 into account the finding that Plaintiff could perform "the full range
2 of light work," the ALJ concluded that plaintiff was not disabled
3 pursuant to Rule 202.20 of the Medical Vocational Guidelines (step
4 five). [AR 23.] Accordingly, Plaintiff's disability claim for the
5 period at issue was denied. [Id.]

6 **C. ISSUES IN DISPUTE**

7 The parties' Joint Stipulation raises two disputed issues:

- 8 1. Whether the ALJ erred in applying the Medical Vocational
9 Guidelines ("Grids"); and
- 10 2. Whether the ALJ properly considered Plaintiff's subjective
11 symptom testimony.

12 [JS 3, 9.]

13 As discussed below, Issue One is dispositive.

14 **D. STEP FIVE FINDING**

15 During the administrative hearing, Dr. Arthur Lorber, a medical
16 expert, testified that based on his review of Plaintiff's medical
17 records, Plaintiff retained the capacity to lift twenty pounds
18 occasionally and ten pounds frequently with additional limitations,
19 including, among other things, no overhead reaching and occasional
20 bending, stooping and crouching. [AR 36.] Subsequently, a vocational
21 expert testified that a person with the limitations described by Dr.
22 Lorber could not perform Plaintiff's past relevant work as a courier
23 or dye casting machine operator. [AR 48.] The ALJ adopted the
24 vocational expert's testimony to determine, at step four, that
25 Plaintiff could not return to his past relevant work. At step five,
26 the ALJ asked whether there was "other work" that a person with
27 Plaintiff's age and limitations could do, to which the vocational
28 expert replied "yes." [AR 49.] However, the ALJ did not ask the

1 vocational expert to cite specific jobs in this category, but instead
2 applied Rule 202.20 of the Grids to make a finding of "not disabled."
3 [AR 23.]

4 Plaintiff argues that the ALJ erred in applying the Grids because
5 Plaintiff has significant non-exertional limitations that preclude
6 application of the Grids and that remand is necessary for vocational
7 expert testimony to identify specific jobs in specific numbers for
8 purposes of the step five finding. [JS 4.] Defendant contends that in
9 light of the finding of Plaintiff's ability to perform the "full range
10 of light work," as well as the insignificant impact of Plaintiff's
11 limitations on the light work occupational base, vocational expert
12 testimony is not necessary. [JS 5.]

13 The Ninth Circuit has clearly delineated when it is appropriate
14 for the Commissioner to rely on the Grids in meeting the burden under
15 Step Five of the disability inquiry.² "The Commissioner's need for
16 efficiency justifies use of the grids at step five" but only when the
17 grids "completely and accurately represent a claimant's limitations."
18 Tackett v. Apfel, 180 F.3d at 1101. "In other words, a claimant must
19 be able to perform the full range of jobs in a given category" in
20 order for the Commissioner to appropriately rely on the grids. Id.

21 "[S]ignificant non-exertional impairments . . . may make reliance
22 on the grids inappropriate." Id. at 1101-02 (citing Desrosiers v.

23
24 ² At Step Five of the five-step sequential inquiry, the
25 Commissioner bears the burden of proving that the claimant can perform
26 "other jobs that exist in substantial numbers in the national
27 economy." Lewis v. Apfel, 236 F.3d 503, 508 (9th Cir.2001). There are
28 two ways for the Commissioner to meet this burden: (1) by the
testimony of a vocational expert or (2) by reference to the Grids.
Tackett v. Apfel, 180 F.3d 1094, 1099 (9th Cir. 1999). In this case,
the Commissioner attempted to satisfy his burden by applying the
Grids.

1 Sec'y of Health & Human Servs., 846 F.2d 573, 577 (9th Cir.1988)).
2 Nonexertional limitations limit ability to work without directly
3 limiting strength, and include mental, sensory, postural,
4 manipulative, and environmental limitations. Desrosiers, 846 F.2d at
5 579; Penny v. Sullivan, 2 F.3d 953, 958 (9th Cir. 1993); Cooper, 880
6 F.2d at 1155 n.7; 20 C.F.R. § 404.1569a(c). When a claimant suffers
7 from a combination of exertional and nonexertional limitations, the
8 ALJ must first consider the Grid rules to decide if a finding of
9 disability can be based on exertional limitations alone. See 20
10 C.F.R. § 404.1569a(d). If so, then benefits must be awarded. Id.
11 However, if exertional limitations are an insufficient basis, by
12 themselves, to support a conclusion of disability, the ALJ may use the
13 grid rules as a "framework" for her decision, but must rely on other
14 evidence, typically, in the form of testimony from a VE, to carry the
15 Commissioner's statutory burden of proving there is other work that
16 plaintiff can do. Id.; see also Johnson v. Shalala, 60 F.3d 1428,
17 1432 (9th Cir. 1995).

18 In this case, Plaintiff had several postural and environmental
19 limitations that precluded exclusive reliance on the Grids to make a
20 Step Five finding. Based on the ALJ's RFC finding, Plaintiff should
21 only occasionally bend, stoop and crouch but refrain from kneeling or
22 crawling; avoid exposure to vibration; avoid overhead reaching; and
23 avoid climbing ladders, ropes, scaffolds, unprotected heights, and
24 slippery or wet surfaces. [AR 20.] These limitations, to the extent
25 that they are based on Dr. Lorber's testimony, are inconsistent with a
26 finding that Plaintiff was capable of a "full range" of light work:
27 Dr. Lorber himself stated in a letter written after the administrative
28 hearing that based on his review of the full record, Plaintiff was

1 capable of functioning at a "limited range of light level of
2 activities, as previously described by me at the time of the hearing."
3 [AR 286.] See Desrosiers, 846 F.2d at 580 ("The [Commissioner] may
4 not avoid the process of consulting a vocational expert by using the
5 Guidelines as though the claimant had the residual functional capacity
6 for the *full range* of 'light work' if in fact the claimant can perform
7 only *some* types of light work")(emphasis in original). Based on these
8 limitations, Plaintiff's residual functional capacity was "not
9 captured by the description of light work used in the Medical-
10 Vocational Guidelines." Id. (finding Guidelines should not have been
11 applied when Plaintiff could do no prolonged lifting, bending,
12 stooping, pulling, pushing, climbing or use of his left upper
13 extremity about shoulder level); see also Burt v. Astrue, No.
14 C07-1888-RSM, 2008 WL 3540191 at *8 (W.D. Wash. Aug. 11, 2008)
15 (finding Guidelines inapplicable when Plaintiff's non-exertional
16 limitations included restrictions in handling, overhead reaching, cold
17 environments, and a need to change position, even if the occupational
18 base did not generally involve working overhead). Accordingly,
19 Plaintiff "cannot perform the *full range* of light work, and the use of
20 the Guidelines to declare that [Plaintiff] was not disabled was
21 improper." Desrosiers, 846 F.2d at 580-81 (emphasis in original).

22 **E. REMAND FOR FURTHER PROCEEDINGS**

23 The decision whether to remand for further proceedings is within
24 the discretion of the district court. Harman v. Apfel, 211 F.3d 1172,
25 1175-1178 (9th Cir. 2000). Where no useful purpose would be served by
26 further proceedings, or where the record has been fully developed, it
27 is appropriate to exercise this discretion to direct an immediate
28 award of benefits. Harman, 211 F.3d at 1179 (decision whether to

1 remand for further proceedings turns upon their likely utility).
2 However, where there are outstanding issues that must be resolved
3 before a determination can be made, and it is not clear from the
4 record that the ALJ would be required to find the claimant disabled if
5 all the evidence were properly evaluated, remand is appropriate. Id.
6 Here, as set out above, outstanding issues remain before a finding of
7 disability can be made.³ Accordingly, remand is appropriate.

8 **VI. ORDERS**

9 Accordingly, **IT IS ORDERED** that:

- 10 1. The decision of the Commissioner is **REVERSED**.
11 2. This action is **REMANDED** to defendant, pursuant to Sentence
12 Four of 42 U.S.C. § 405(g), for further proceedings as discussed
13 above.
14 3. The Clerk of the Court shall serve this Decision and Order
15 and the Judgment herein on all parties or counsel.

16
17 DATED: May 6, 2009

18 _____/S/
19 CARLA M. WOEHRLE
20 United States Magistrate Judge
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25 _____
26 ³ Plaintiff's second claim, that the ALJ failed to provide clear
27 and convincing reasons to reject Plaintiff's subjective complaints,
28 does not change the outcome. Assuming without deciding that the claim
has merit and that Plaintiff's testimony should be credited as true, a
finding of disability still would not be directed by the existing
record. Accordingly, remand for further proceedings is required.